

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20037**

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Petition of FairPoint Communications, Inc.	)	
For Declaratory Ruling or,	)	CC Docket No. 02-33
In the Alternative, Waiver to Provide	)	
Broadband Internet Access Service	)	WC Docket No. 10-90
on a Non-Common Carrier Basis	)	
	)	

**COMMENTS OF THE  
UNITED STATES TELECOM ASSOCIATION**

USTelecom appreciates the opportunity to file these brief comments in support of the relief requested by FairPoint Communications, Inc. (“FairPoint”) in this proceeding.<sup>1</sup> FairPoint requests that the Commission provide it whatever relief might be necessary, if any, to allow the company’s rate-of-return subsidiaries to provide broadband Internet access services on a non-common carrier basis. The Commission should grant FairPoint’s request expeditiously.

**I. BACKGROUND**

In its *Wireline Broadband Internet Access Services Order*, the Commission established “a new regulatory framework” under which broadband Internet access services offered by wireline facilities-based providers are subject to “a lighter regulatory touch.”<sup>2</sup> The Commission adopted this approach in order to encourage competition in the provision of broadband services by

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<sup>1</sup> *FairPoint Communications, Inc. Petition for Declaratory Ruling or, In the Alternative, Petition for Waiver to Provide Broadband Internet Access Service on a Non-Common Carrier Basis*, CC Docket No. 02-33, WC Docket No. 10-90 (filed May 1, 2012) (“*FairPoint Petition*”).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, and WC Docket Nos. 04-242, 05-271, 20 FCC Rcd 14853, ¶¶ 1-3 (2005) (“*Wireline Broadband Internet Access Services Order*”).

applying to incumbent local exchange carriers (ILECs) a similar light regulatory model as had previously applied to cable broadband providers.

In the parlance of the FCC's Order, "wireline broadband Internet access service" ("WBIAS," more commonly referred to as retail DSL service) is an "information service" because it integrates an "underlying broadband transmission service" (a "telecom service") with data processing capabilities that allow end-users to, among other things, access the Internet. Importantly, even though the integrated end-user WBIAS product has a telecom service component (the "underlying broadband transmission service"), the FCC found that the sale of that integrated product does not involve (and never has involved) the sale of a separate telecom service.

The *Wireline Broadband Internet Access Services Order* eliminated pre-existing Computer Inquiry requirements applicable to WBIAS, particularly the requirement that ILECs offering a retail DSL service make available under tariff an underlying broadband transmission service on a non-discriminatory basis. Previously, all ILECs had to purchase the underlying broadband transmission service from themselves before packaging it to create their own retail WBIAS (retail DSL, for example).

Instead, the *Wireline Broadband Internet Access Services Order* granted ILECs providing WBIAS the option of selling standalone broadband transmission service on a wholesale basis to third parties in one of three ways: as a tariffed common carrier service; as a de-tariffed common carrier service; or on a Title I private-carriage basis.

The Order responded to arguments that offering such transmission services on a private carriage basis would raise significant cost-accounting issues by finding that *for price-cap carriers*, the FCC need not be concerned about these issues because there was little direct

relationship between regulated costs and prices and any such concerns were outweighed by the public policy benefits. *With respect to rate-of-return carriers*, however, the Commission determined that it did not need to address in detail these cost accounting issues at that time because representatives for rate-of-return carriers had indicated they did not intend to offer their underlying broadband transmission service on a Title I private carriage basis—so the Commission declined to address these cost allocation issues for rate-of-return carriers in light of their “hypothetical” nature.

## **II. DISCUSSION**

FairPoint’s petition seeks the Commission’s approval to exercise the relief granted by the *Wireline Broadband Internet Access Services Order* with respect to its rate-of-return ILEC subsidiaries.

As FairPoint’s petition correctly states, the “new regulatory framework” that the Commission adopted in its *Wireline Broadband Internet Access Services Order* plainly applied to all wireline facilities-based providers, both price cap and rate-of-return regulated.<sup>3</sup> In summarizing the actions it was taking in that *Order*, the Commission made clear that the lighter regulatory approach it was adopting applied without exception to “facilities-based providers of wireline broadband Internet access service.”<sup>4</sup> In fact, the Commission expressly noted that its goal of facilitating broadband deployment would best be served “by providing *all* wireline broadband providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers in their respective service areas.”<sup>5</sup> Nothing in the *Wireline Broadband Internet Access Services Order*

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<sup>3</sup> See, *FairPoint Petition* at p. 7.

<sup>4</sup> *Wireline Broadband Internet Access Services Order* at ¶ 5.

<sup>5</sup> *Id.* ¶ 89 (emphasis added).

can reasonably be read to suggest that the Commission intended to carve out rate-of-return carriers from its scope.<sup>6</sup>

As noted above, however, the *Wireline Broadband Internet Access Services Order* recognized that there *might* be a difference with respect to the requisite cost-accounting showing involved if a rate-of return rather than price cap company elected to provide standalone broadband transmission service under Title I rather than Title II. The Commission found that it need not be concerned about cost-accounting issues with respect to price cap regulated carriers because there was little direct relationship between regulated costs and prices and any such concerns were outweighed by the public policy benefits.<sup>7</sup> But, as noted, it declined to specify an appropriate showing for rate-of-return carriers at that time because no rate-of-return carrier participating in the proceeding indicated an interest in exercising the private carriage option.<sup>8</sup>

Subsequently, in the *ACS Forbearance Order*, the Commission did provide some additional specificity as to a cost accounting showing that would be deemed appropriate for a rate-of-return carrier.<sup>9</sup> In doing so, however, the Commission emphasized that the need for addressing cost accounting issues arises only to the extent that “an earnings determination is used for ratemaking purposes...”<sup>10</sup> The Commission elaborated that “the affected carrier will have to

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<sup>6</sup> *Id.* ¶ 138 (noting that it was giving rate-of-return carriers the “option” of continuing to offer broadband transmission as a Title II common carrier service and declining to, “at this time, address the treatment of private carriage arrangements by rate-of-return carriers ...”).

<sup>7</sup> *Wireline Broadband Internet Access Services Order* at ¶ 133.

<sup>8</sup> *Id.*

<sup>9</sup> See, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance*, 22 FCC Rcd 16304, WC Docket No. 06-109, Memorandum Opinion and Order (2007) (“*ACS Forbearance Order*”).

<sup>10</sup> *ACS Forbearance Order* at ¶ 81, n.230.

propose a way of removing the costs of any non-Title II services from the computation.”<sup>11</sup> The Commission further noted that “unless there likewise is an appropriate allocation of a rate-of-return carrier’s costs for the non-common carrier provision of DSL transmission service, those costs could be recovered through increases in the rates for other interstate special access services that remain subject to rate-of-return regulation.”<sup>12</sup>

But as FairPoint explains in detail in its *Petition*, this condition is moot for FairPoint’s rate-of-return companies because FairPoint has already implemented cost allocation procedures that address the issue underlying this condition. Moreover, the FairPoint rate-of-return companies are effectively treated as price cap carriers for all relevant regulatory purposes, including for purposes of the USF/ICC Transformation Order, and their interstate rates and universal service support are severed from costs.<sup>13</sup> Accordingly, FairPoint should be allowed to exercise all of the options provided by the Commission in the *Wireline Broadband Internet Access Services Order*.

Respectfully submitted,



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<sup>11</sup> *ACS Forbearance Order* at ¶ 76, citing *Wireline Broadband Internet Access Services Order* at ¶ 137.

<sup>12</sup> *ACS Forbearance Order* at ¶ 76.

<sup>13</sup> *See, FairPoint Petition* at pp. 8-11.